(2009) 09 MAD CK 0187

Madras High Court

Case No: C.R.P. (PD) No. 821 of 2009 and M.P. No. 1 of 2009

M. Natesan		APPELLANT
	Vs	
Sellammal (died) (Balasundaram and Others)		RESPONDENT

Date of Decision: Sept. 3, 2009

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 6 Rule 17

Hon'ble Judges: K.K. Sasidharan, J

Bench: Single Bench

Advocate: P. Jagadeesan, for the Appellant; R. Meenal, for RR 1 to 3, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

K.K. Sasidharan, J.
This civil revision petition is directed against the order dated 1.12.2008 in I.A. No. 583 of 2008 in O.S. No. 106 of 2008 on the file of the learned Additional District Judge, Fact Track Court No. II, Salem, whereby and where under the application preferred by the revision petitioner invoking Order 6 Rule 17 of the CPC for the purpose of amendment of the plaint was dismissed.

THE FACTS:

2. The suit in O.S. No. 106 of 2008 was originally filed before the II Additional District Munsif, Salem and it was registered as O.S. No. 671 of 1999. Subsequently it was transferred to the Court of Additional District Judge, Salem and renumbered as O.S. No. 108 of 2008.

3. The parties are hereinafter referred to as "plaintiff" and "defendants" as per their status before the trial court.

4. In the suit in O.S. No. 671 of 1999 the following reliefs were prayed for:

(a) Declaring the decree and judgment passed in O.S. No. 696 of 1991 dated 21.12.1992 on the file of the Additional District Munsif, Salem is not binding on the plaintiff and thereby cancel the same.

(b) restraining the defendants and their men from in any way interfering with the plaintiff''s peaceful possession and enjoyment of the suit property by way of permanent injunction.

5. In the plaint, the plaintiff inter alia contended thus:

(a) The suit property originally belonged to Marimuthu Pillai, who had three sons namely, Rathinam, Subramaniam as well as the plaintiff. He had three daughters, who are arrayed as defendants 6 to 8 in the suit. Even during the life time of Marimuthu Pillai, the family was in debts.

(b) Subsequent to the death of father, the plaintiff was doing separate business. His brothers and sisters were married and were living separately. The property was small to be partitioned and hence in the panchayat it was decided that whoever takes the property must discharge the loan and to pay compensation to the value of shares to the other heirs of Marimuthu Pillai.

(c) It was agreed by the plaintiff that he would discharge the loan and accordingly he discharged the loan of Rs. 24,000/- due to Salem Sri Ramavilas Company Limited and another sum of Rs. 10,000/- by way of mortgage loan taken from one Karuppanna Pillai of Attur Taluk. He had also paid a sum of Rs. 13,500/- to his brothers and sisters, who in turn had executed a registered release deed dated 1.12.1976 which was registered as document No. 66 of 1978.

(d) The other legal heir Rathinam, the brother of the plaintiff had also executed a registered release deed for himself and on behalf of his minor sons and the second defendant, who was major had also signed the release deed. The first defendant is the widow and defendants 2 to 4 are the children of Rathinam. The said Rathinam died in the year 1981 and defendants 1 to 4 had knowledge about the release deed and the second defendant had been a party to the document.

(e) While so, defendant 1 to 4 had issued notice claiming a share in the property alleging that the release deed was not binding on them. Subsequently they also filed a suit in O.S. No. 696 of 1991 on the file of the learned District Munsif, Salem and managed to get an ex parte decree taking advantage of the death of the counsel, who appeared on his behalf. The said suit was a mala fide one and the allegations are mischievous and false. Defendants 1 to 4 have abused the process of the court by misrepresentation and false allegations and had committed fraud.

(f) Defendants 2 to 4, being the party to the release deed and the second defendant himself being an executant must have prayed for cancellation of the documents.

The minors ought to have come forward within three years of attaining majority to set aside the document. Therefore the suit filed them was not maintainable.

(g) The property had been in the possession of the plaintiff and the municipal and revenue records also stands in his name. He had also mortgaged the property. The service connection also stands in his name. He had been paying the property tax and kist to the Municipality and the Government.

(h) Defendants 2 to 4 are trying to execute the decree in O.S. No. 696 of 1991 which they have obtained fraudulently and by committing fraud on the process of the court. The decree which had been obtained by fraud and misrepresentation was not binding on the plaintiff and as such it was liable to be cancelled.

6. The suit was contested by the defendants by filing written statement.

(a) In the written statement filed by the fifth defendant it was contended that the brother of the plaintiff Rathinam had no right to execute the release deed on behalf of the minor sons, as the debt was incurred for illegal purpose.

(b) The legal heirs of Rathinam, defendants 1 to 4 contended that the deceased Rathinam was spending lavishly and had bad habits. The so called debts had been incurred for illegal purpose and not for the welfare of the family. Defendants 1 to 4 are entitled to a share in the suit property as per the provisions of the Hindu Succession Act.

(c) It is true that defendants 1 to 4 filed a suit for partition in O.S. No. 696 of 1991 before the learned District Munsif, Salem against the plaintiff and obtained a preliminary decree for partition. The application filed by the plaintiff to set aside the ex parte decree with an application to condone the delay in filing the application was dismissed by the trial court and it was also confirmed by the High Court. Therefore the suit is barred by limitation.

7. In the written statement filed by the third defendant it was inter alia contended thus:

(a) It is not true to say that even during the life time of Mairmuthu Pillai, the family was in debts. The averment that there was a panchayat in which it was decided that the property is too small to be partitioned and that whoever takes the property must discharge the loan and also make compensation of the value of the property to other sharers, was not true.

(b) It is not true to say that the plaintiff discharged the loan due to Sri Ramavilas Company Limited to the tune of Rs. 21,000/- and another mortgage loan of Rs. 10,000/- due to Karuppana Pillai of Attur Taluk. The further averment in the plaint that he had paid a sum of Rs. 13,500/- to his brothers and sisters who in turn had executed a release deed dated 1.12.1976 was also denied.

(c) The alleged loans were discharged from the family funds only and not by the plaintiff much less with his own funds. Similarly no amount was paid to the brothers and sisters of the plaintiff. The averment that deceased Rathinam executed a release deed on behalf of the minor children were specifically denied. The release deed was not a true document at all and there was no necessity to execute the alleged release deed.

(d) The plaintiff was represented through Advocate Jayapal and as such it was incorrect to state that on account of the death of Advocate K.M. Kolandi, he was not in a position to appear before the trial court to conduct the proceedings in O.S. No. 696 of 1991.

(e) The decree in O.S. No. 696 of 1991 was made by a court of competent jurisdiction and as such it was binding on the plaintiff. There was absolutely no fraud in obtaining the decree. If the decree has to be set aside on the ground of fraud, the suit has to be filed within three years from the date of fraud or date of knowledge of fraud. The plaintiff has affirmed in the affidavit in I.A. No. 23 of 1999 that he came to know about the decree on 8.2.1996. Therefore even as per the contention of the plaintiff, the suit was barred by limitation.

AMENDMENT:

8. While the matters stood thus, the petitioner/plaintiff filed an application in I.A. No. 288 of 2003 praying for an order to amend the plaint for the purpose of incorporating a paragraph in the plaint and to substitute the prayer.

9. In the affidavit filed in support of the application for amendment it was the case of the plaintiff that in the plaint in O.S. No. 106/2008 certain particulars with respect to the fraud played by the defendants as well as the circumstances which culminated in passing the ex parte decree were not projected and as such it was absolutely necessary to amend the plaint for the purpose of incorporating those details.

10. (a) The application was opposed by the third defendant mainly on the ground that the decree in O.S. No. 696 of 1991 would operate as res judicata and as such the plaintiff was not entitled to a decree as sought for by him. According to the third defendant, the details of fraud which is now alleged in the application was known to the plaintiff long ago and he has not chosen to set aside the decree on the ground of fraud and therefore it was not permissible for him to get a relief to set aside the decree indirectly after the expiry of the period of limitation by way of amendment of the plaint.

(b) The third defendant also contended that the decree obtained by fraud is not a void decree and it is only a voidable decree and it must be set aside within three years from the date of fraud or date of knowledge of fraud. Since the plaintiff has not taken any steps to set aside the decree in the manner known to law, the decree

has become final and as such challenge cannot be permitted by way of amendment.

DISPOSAL BY THE TRIAL COURT:

11. The learned trial Judge considered the merits of the matter itself and was of the view that the contention of the third defendant with respect to the plea of res judicata was a substantial one, which goes to the root of the matter and as such the plaintiff cannot be permitted to amend the plaint. The learned trial Judge was also of the view that the amendment would result in changing the very nature of the suit and it would also cause undue prejudice to the defendants and accordingly dismissed the application.

12. Aggrieved by the said order, the unsuccessful plaintiff is before this Court by way of this civil revision petition.

SUBMISSIONS:

13. The learned Counsel for the plaintiff contended that the basic facts necessary for getting a decree on the ground of fraud as well as unsustainability of the decree in O.S. No. 671 f 1999 were already pleaded in the plaint originally filed. The details of such fraud alone were sought to be incorporated in the plaint by way of amendment. Therefore the amendment was only for the purpose of supplementing details. However the learned trial Judge has gone too far and considered the very merits of the suit and arrived at a conclusion that the subsequent suit was barred by res judicata, which was not a correct approach.

14.(a) The learned Counsel appearing on behalf of the third defendant contended that the plaintiff has filed an application to set aside the ex parte decree in O.S. No. 671 of 1999 along with an application to condone the delay and the petition was dismissed by the trial court and it was also confirmed by this Court. Therefore the judgment and decree in O.S. No. 671 of 1999 has become final. Since the said decree is in operation, the present suit is barred by the principle of constructive res judicata and as such it was not permissible for the plaintiff to contend for the position that the earlier decree was obtained by fraud.

(b) According to the learned Counsel, the third defendant had already filed an application for passing of final decree and the plaintiff had filed multiple suits only with a view to drag on the proceedings.

(c) The learned trial Judge has considered the entire issue in extenso and arrived at a factual finding that the plaintiff was not entitled to amend the plaint and the said order being purely a discretionary order, is not liable to be interfered in the civil revision petition.

DISCUSSION:

15. The suit in O.S. No. 448 of 1991 was filed by the plaintiff praying for a decree of declaration and permanent injunction. The said suit was based on the release deed

stated to have been executed on 1.12.1976 by the legal heirs of Marimuthu Pillai. The suit in O.S. No. 696 of 1991 was filed by defendants 2 to 4 praying for a decree of partition of their 1/6th share in the suit property. The present suit in O.S. No. 671 of 1999 was filed by the plaintiff for a decree of declaration that the judgment and decree in O.S. No. 696 of 1991 was not binding on him and was liable to be cancelled.

16. The plaintiff has also filed a suit in O.S. No. 890 of 2002 praying for a decree of declaration and injunction with respect to one plot of the suit property, which was obtained by way of a decree of specific performance dated 23.2.1992 in O.S. No. 101 of 1982.

17. In the plaint in O.S. No. 671 of 1999 the plaintiff has stated that the suit property was the subject matter of the release deed dated 1.12.1976 whereby and where under the legal heirs of Marimuthu Pillai released their share in his favour. The predecessor-in-interest of defendants 1 to 4 also executed a release deed in his favour. The release deed was signed by the second defendant, who was major at that time and his father Rathinam signed the released deed on his behalf and on behalf of his minor children.

18. The suit in O.S. No. 696 of 1991 was filed by the defendants before the District Munsif, Salem and in the said suit the plaintiff has entered appearance through his counsel. However his counsel died during the pendency of the suit and taking advantage of his death the defendants got an ex parte decree. Therefore the background facts with regard to the ex parte decree in O.S. No. 696 of 1991 and the alleged fraud played by the defendants were already pleaded by the plaintiff in the plaint in O.S. No. 671 of 1999.

19. By way of amendment, the plaintiff has only supplemented certain particulars for the purpose of substantiating his contention with regard to the alleged fraud played by the defendants as well as the circumstances leading to the ex parte decree in O.S. No. 696 of 1991.

20. I have gone through the entire pleadings sought to be incorporated by way of amendment. The plaintiff has only corroborated his version as found in the plaint originally filed. Nothing new was introduced in the plaint by way of amendment, which would lead to the change of cause of action or the nature of the suit. The nature of the suit would remain the same even after amendment. There was no withdrawal of admission or deletion of pleadings. The plaintiff was only providing certain additional particulars which would throw light on the alleged fraud as well as the ex parte decree.

21. The learned trial Judge considered the merits of the suit itself though the matter before him was only an amendment application. It is trite that while considering an application for amendment the Court has to consider only the merits or otherwise of the averments in the application for amendment and the question of genuineness

or bonafides of the case as projected in the additional pleadings was beyond scrutiny at the time of such consideration.

22. The suit being one for setting aside the decree obtained by the defendants, the burden of proof is clearly on the plaintiff. The responsibility lies on the plaintiff to substantiate his contentions. He is bound to produce evidence in support of his plea of fraud. By way of this amendment, the plaintiff was only detailing the basic facts, as otherwise the evidence adduced by him would be challenged on the ground of absence of pleadings.

23. In Rajesh Kumar Aggarwal and Others Vs. K.K. Modi and Others, , the Supreme Court while considering the scope and ambit of Order 6 Rule 17 of the CPC observed thus:

15. The object of the rule is that the courts should try the merits of the case that come before them and should, consequently, allow all amendments that may be necessary for determining the real question in controversy between the parties provided it does not cause injustice or prejudice to the other side.

16. Order 6 Rule 17 consists of two parts. Whereas the first part is discretionary (may) and leaves it to the Court to order amendment of pleading. The second part is imperative (shall) and enjoins the court to allow all amendments which are necessary for the purpose of determining the real question in controversy between the parties.

17, 18. ...

19. While considering whether an application for amendment should or should not be allowed, the Court should not go into the correctness or falsity of the case in the amendment. Likewise, it should not record a finding on the merits of the amendment and the merits of the amendment sought to be incorporated by way of amendment are not to be adjudged at the stage of allowing the prayer for amendment....

24. The application for amendment was filed even before the commencement of trial and as such it cannot be said that the application was unduly belated. There is no question of prejudice caused to the second defendant as there was nothing new in the amended pleadings and the evidence is yet to commence. The issue regarding the alleged fraud played by the defendants in getting a decree in O.S. No. 696 of 1991, the inability of the plaintiff to attend the court for the purpose of contesting the suit etc., are all matters to be proved by the plaintiff. By way of this amendment, he was only doing the ground work for adducing evidence to substantiate his contention. In any case the merits of the matter has to be considered by the learned trial Judge only at the time of trial and it is too premature to consider the entire factual matrix.

25. Therefore I am of the view that the learned trial Judge failed to exercise the discretion properly thereby warranting interference by this Court in exercise of the supervisory jurisdiction.

CONCLUSION:

26. The learned trial Judge is directed to dispose of the suit uninfluenced by the observations as contained in the order impugned this revision. It is open to the defendants to file additional written statement in respect of the plaint as amended.

27. In the result, the order dated 1.12.2008 in I.A. No. 583 of 2008 is set aside and the civil revision petition is allowed. Consequently, the connected MP is closed. No costs.